IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 1378 of 2022
With
CRAN 1 of 2022
With
CRAN 2 of 20222

Rakesh Samanta & Ors.
-Vs-
The State of West Bengal & Anr.

For the Petitioner:	Mr. Sabir Ahmed, Adv., Mr. Shraman Sarkar, Adv., Mr. Abdur Rakib, Adv., Mr. Asif Sohail Tarafdar, Adv., Mr. Dhiman Banerjee, Adv.
For the O.P. No.2:	Mr. Kallol Mondal, Adv., Mr. K. Roy, Adv., Mr. Souvik Das, Adv., Mr. A. Banerjee, Adv.
For the State:	Mr. Sudip Ghosh, Adv., Mr. Apurba Kumar Datta, Adv., Mr. B. Banerjee, Adv.

Heard on: 20 January, 2023.

Judgment on: 14 March, 2023.

BIBEK CHAUDHURI, J. : –

1. The petitioners have been arraigned as accused persons in G.R. case no. 1058 of 2022 arising out of Baranagar P.S. Case no. 72 of 2022 dated 4th February, 2022 under section 406/420 of the Indian Penal Code filed against the petitioners presently pending before the learned Additional Chief Judicial Magistrate, Barrackpore. The petitioners have

prayed for quashing of the aforementioned criminal case instituted against them.

2. On the basis of written complaint submitted by the opposite party number 2 alleging inter alia that he has business in trading gold from different traders. After making jewelry out of such gold, he used to accept gold bullions/ bars from the traders and supply as per the order. In course of such transactions, he came to know about the petitioner no. 1 who runs a firm in the name and style of "Samraj Traders". In 2017 they started their business transaction where petitioner no. 1 used to give orders of making gold jewellry to the opposite party no.2 and he used to supply the same to petitioner no.1. Petitioner no.2 is the father of petitioner no.1, petitioner no.3 is an employee of Samraj traders and petitioner no.4 is the matrimonial relation of petitioner no. 1. It is alleged by the defacto complainant that he had delivered the gold ornaments to petitioner no. 1 in time but he started deferring issuance of gold for the purpose of making the ordered ornaments. The defacto complainant has supplied petitioner no.1 gold ornaments weighing 21,544.764 Kgs and he delivered 13,483.440 Kgs of gold. As such the defecto complainant is entitled to 8,061.324 Kgs of gold from the petitioner no.1.

3. It is pertinent to mention here that the petitioner no.1 had lodged an FIR against the opposite party no.2 before L.T. Marg police station on the basis of which case No. 171 of 2019 dated 28th May, 2019 under Section 409/120B of the IPC was registered. It is alleged in the written complaint that the opposite party No.2 took a total of 20480.0 grams of

pure gold worth about Rs. 6,73,66,069/- but did not give any jewellery to the petitioner No.1. Charge-sheet has been filed dated 15th August, 2020 against the opposite party No.2 and others and trial is going on.

4. The petitioner no.1 through his company filed a commercial suit against the opposite party No.2 and others before the Bombay High Court beings COMM. SUIT (LODG) no.1064 of 2019, registered as COMM.SUIT No.72 of 2021 praying for return of gold to his company. Upon receiving summons, the opposite party no.2 filed Affidavit in reply where he clearly stated in oath that 349.568 gms of gold has to be given to the petitioner No.1. The petitioners also came to know that one Asish Mundra who received gold from opposite party no.2 was arrested by the Directorate of Revenue Intelligence for smuggling gold and large amount of gold has been seized by them. A complaint case was initiated against Asish Mundra before the Chief Judicial Magistrate, Barasat in which the petitioner No.1 tried to intervene by filing an application for safe return of their goal but it was dismissed by giving liberty to file before appropriate authority. The petitioner No.1 also filed a writ application being No. W.P.O No. 1498 of 2021 before this court praying for claiming gold seized by the Directorate of Revenue Intelligence. The matter was dismissed giving liberty to the petitioner no.1 Company to approach proper authority with an application under Section 110A of the Customs Act.

5. It is alleged by the petitioner that in the year 2022 they came to know that the opposite party no.2 and others filed an application for discharge under Section 239 of the Cr.P.C in connection with C.C. no.

358/PW/2020 before the court of Learned Metropolitan Magistrate, 28th Court at Mumbai. At that time they came to know about the FIR lodged against them at Baranagar P.S being No.72 of 2022 by the opposite party no.2.

6. Learned advocate for the petitioners submits that upon coming to know about the FIR, the petitioner no.1 through his company wrote letter to the Commissioner of Police, Barrackpore to serve notice upon them regarding the case and relevant documents. The learned advocate for the petitioners further states that to co-operate and to help in the investigation they duly appeared before they Learned Magistrate on 14th and 15th March praying for bail which was allowed on ad-interim basis with condition to appear before the investigational officer once a week. Thereafter final bail was granted to them on 18th April 2022.

7. Learned advocate on behalf of the petitioners submits that the investigating officer sent notices under Section 160 of the Cr.P.C for producing relevant documents/mobile phones which was duly replied by the petitioners. The investigating agency failed to consider the invoices, sell bills and stock register where opposite party No.2 has returned the gold ornaments using his own voucher and labour charges of making gold jewellery was paid to the petitioner and registered the FIR.

8. It is submitted by the learned Advocate for the petitioners that the FIR was registered without verifying the L.T Marg police station and no notice under Section 41A was served upon them. The petitioners out of their own volition provided all relevant documents to the investigation

authority. It was further submitted that the FIR was registered after almost 3 years only to harass and tarnish the image of the petitioners and drag them into vague litigation.

9. Learned Advocate for the petitioners submits that charge under Section 406 of the IPC prescribes punishment for the offence of criminal breach of trust as defined in section 405 of the IPC:

> *"**405. Criminal breach of trust**.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust"*

10. It is submitted by the Learned advocate for the petitioners that it is evident from the written statement that the petitioners had not been given/ entrusted/ handed with any property of the opposite party no. 2 which has been misappropriated by the petitioners. The absence of the element 'entrustment' and 'misappropriation' in favour of petitioners thereof no case for commission

11. It is further submitted by the ld. Advocate for the petitioners that the charge under Section 420 of the IPC is a misnomer. Section 420 runs thus-

> *"**420**. Cheating and dishonestly inducing delivery of property.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend* to seven years, and shall also be liable to fine."

12. It is submitted by the learned Advocate for the petitioners that *mens rea* is the most vital ingredient for commission of the offence of cheating. Mere commercial dispute cannot give rise to criminal prosecution for cheating unless a fraudulent intention is to be shown at the beginning of the transactions. The petitioner No.1 through his company has provided gold bullion/bar to the opposite party No.2 for making gold ornaments and there is no material to show that the petitioners have taken anything or cheated anyone.

13. In support of his contention learned Advocate for the petitioners rely on the judgment of the Supreme Court in **Vijay Kumar Ghai and Ors. State of West Bengal & Ors**. reported in **(2022) 7 SCC 124** referring to para 34-37:-

> ***34.*** *Section 420 IPC is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section*

is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.

35. *To establish the offence of cheating in inducing the delivery of property, the following ingredients need to be proved:*

(i) The representation made by the person was false.

(ii) The accused had prior knowledge that the representation he made was false.

(iii) The accused made false representation with dishonest intention in order to deceive the person to whom it was made.

(iv) The act where the accused induced the person to deliver the property or to perform or to abstain from any act which the person would have not done or had otherwise committed.

36. *As observed and held by this Court in the case of Prof. R.K. Vijayasarathy & Anr. vs. Sudha Seetharam, the ingredients to constitute an offence under Section 420 are as follows:*

(i) a person must commit the offence of cheating under Section 415; and

(ii) the person cheated must be dishonestly induced to:

(a) deliver property to any person; or

(b) make, alter or destroy valuable security or anything signed or sealed and capable of being converted into valuable security. Thus, cheating is an essential ingredient for an act to constitute an offence under Section 420 IPC.

37. *The following observation made by this Court in Uma Shankar Gopalika v. State of Bihar & Anr. with almost similar facts and circumstances may be relevant to note at this stage :*

> *"6. Now the question to be examined by us is as to whether on the facts disclosed in the petition of the complaint any criminal offence whatsoever is made out much less offences under Sections 420/120-BIPC. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs 4,20,000, they would pay a sum of Rs 2,60,000 to the complainant out of that but the same has never been paid. It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the consumer forum in relation to the claim of Rs 4,20,000. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case, it has nowhere been stated that at the very inception that there was intention on behalf of the accused persons to cheat which is a condition precedent for an offence under Section 420IPC.*
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> *7. In our view petition of complaint does not disclose any criminal offence at all much less any offence either under Section 420 or Section 120-BIPC and the present case is a case of purely civil dispute between the parties for which remedy lies before a civil court by filing a properly*

> *constituted suit. In our opinion, in view of these facts allowing the police investigation to continue would amount to an abuse of the process of court and to prevent the same it was just an expedient for the High Court to quash the same by exercising the powers under Section 482CrPC which it has erroneously refused."*

14. The P.P-in-Charge, on the other hand, takes me to the relevant pages of the case diary. It is ascertained from the case diary that the opposite party/defacto complainant received gold bar through invoice from Samraj Gold Export Private Limited. There is no allegation that the opposite party No.2 did not convert the said gold bars to ornaments and handover the said ornaments to the petitioners. It is also ascertained from the case diary that the entire business of preparation of gold ornaments from gold bars are somewhat shady and covered with mystery. It is alleged by the opposite party that accused Rakesh Samanta received gold ornaments weighing 13 kg 69 grms 560 mlg but he did not make payment of the said ornaments. Subsequently, Rakesh Samanta gave gold bars weighing 12 kg and 720 grms. At present the defacto complainant will get gold weighing about 349 gram and 668 mlgm. There is ample reason to hold at this stage that the petitioners misappropriated gold ornaments after taking delivery of the same from the opposite party and in exchange they did not return the gold bars weighing 568 mg to the defacto complainant. It is also found from the case diary that there remains claim and counter

claim between the parties. Both the parties instituted criminal case against each other.

15. At this stage taking into consideration the materials in the case diary this Court is of the view that this is not a fit case where the criminal proceeding should be quashed.

16. In view of the above discussion, the instant revision is dismissed on contest however, without cost.

(Bibek Chaudhuri, J.)